

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 27**

MODERN DISPLAY SERVICE, INC. d/b/a  
MODERN EXPOSITION SERVICES<sup>1</sup>

Employer,

Case No. 27-RC-8364

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
AFL-CIO, LOCAL 222

Petitioner.

**DECISION AND DIRECTION OF ELECTION**

On January 3, 2005, International Brotherhood of Teamsters, AFL-CIO, Local 222, herein "the Petitioner," filed a petition under Section 9(c) of the National Labor Relations Act, as amended, herein "the Act," seeking to represent "All Convention Formans [sic] and Warehousemen"; and excluding "All management, supervisors, office clerical and gaurds [sic] as defined in the Act." On January 20, 2005, a hearing was held before Hearing Officer Nancy S. Brandt. Following the close of the hearing, counsel for both parties filed timely briefs.

This case presents a single issue: Are the production foremen, senior foremen and the national production manager supervisors within the meaning of Section 2(11) of the Act who must be excluded from the stipulated appropriate unit? The Employer contends that the nine individuals employed in these positions, all of whom share and

exercise identical authority, are statutory supervisors, while the Petitioner maintains that they are employees. As discussed below, I conclude that the production foremen, senior foremen and the national production manager, who are collectively referred to by the Employer as production foremen, are statutory supervisors who must be excluded from the bargaining unit.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the parties stipulated, and I find, that the Employer is a Utah corporation with an office and place of business in Salt Lake City, where it is engaged in the business of providing road show related services. On an annual basis, the Employer purchases and receives goods and materials valued in excess of \$50,000 at its Salt Lake City facility directly from suppliers located outside the State of Utah.
3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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<sup>1</sup> At the hearing, the parties stipulated to the Employer's correct legal name.

5. The parties stipulated, and I find, that it is appropriate to direct an election in the following group of employees:

**INCLUDED:** Full-time and regular part-time warehouse assistants, carpet assistants, warehouse managers, carpet supervisors, and assistant production foremen who are employed by the Employer at its facility located at 424 South 700 East, Salt Lake City, Utah.

**EXCLUDED:** Guards; production foremen, senior foremen, national production manager and other supervisors as defined in the Act; and all other employees.

### **BACKGROUND**

The Employer provides materials, equipment, and labor for the assembly and disassembly of those materials for customers that produce trade shows, conventions, special events, and other public and private events. The Employer provides its services for 300 to 600 events annually. Approximately half of the events for which the Employer provides its services take place in the State of Utah, and the others take place in Arizona, California, and Nevada.

The Employer's exposition division is operated from its facility located at 424 South 700 East, Salt Lake City, UT and consists of offices and a warehouse used for storage of equipment and materials. The equipment and materials are loaded by the employees included in the stipulated appropriate unit in this matter onto trucks for transport to the venue used by a customer for its event. At the conclusion of the event, the equipment and materials are again loaded onto trucks for transport back to the Employer's warehouse.

Vice-president Aaron Bludworth is responsible for the overall operation of the Employer's exposition division. Pat Baumgardner is the director of operations, and he

has two production managers, Sidney Broussard and Richard Burn, who report directly to him.<sup>2</sup> The nine production foremen at issue in this proceeding are directly responsible to production managers Broussard and Burn.

The Employer is party to a collective bargaining agreement with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories, and Canada, AFL-CIO, CLC Local 99, herein "IATSE Local 99," a labor organization that has chosen to not participate in this proceeding. The contract between the Employer and IATSE Local 99 grants that labor organization the exclusive right to refer all the temporary employees, with some exceptions, utilized by the Employer at the various shows and expositions serviced by the Employer. The employees represented by IATSE Local 99 are those ". . .employed in exhibition and display,[sic] work, decorating, carpet laying, floor marking, sign hanging, pipe and drape, exhibit installation and dismantling, sign rigging, electrical power distribution, freight and drayage handling, forklift and other equipment operation, general labor, and truck driving except for transporting materials used in the scopes [sic] of work listed above. . ."

For an event serviced by the Employer, the service typically begins when a sales account employee receives a customer order and creates a file for the event. The director of operations and production managers assign a production foreman to the

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2. The parties stipulated that Aaron Bludworth, is a managerial employee and should be excluded from the appropriate unit on that basis. The record supports this stipulation. The parties further stipulated that Pat Baumgardner, Sydney Broussard, and Richard Burn are supervisors within the meaning of the Act. Because the record reflects that these individuals possess and exercise the supervisory indicia set forth in Section 2(11) of the Act, including the authority to hire and discharge employees, they also are excluded from the appropriate unit.

event, and the event file is provided to that production foreman.<sup>3</sup> Once assigned to an event, a production foreman determines what materials, equipment, employee skills, number of employees, and length of time are necessary for the Employer to fulfill its service obligation. After the production foreman determines those factors, he notifies Director of Operations Baumgardner who, in turn, communicates with IATSE Local 99 for the referral of the number and type of employees requested by the foreman.

Once assigned to provide the Employer's services to a customer for a particular event, the production foreman is directly responsible for all service to the customer for the successful presentation of the event from the time the event begins to the time it ends. The production foreman is the Employer's representative in dealing with the customer at the event site. Should the production foreman determine the employees referred to an event are lacking in either skills or number, he retains temporary employees from temporary staffing agencies. The record reflects that a production foreman typically oversees 10-20 employees at a particular event. However, a production foreman may be responsible for the activities of as many as 100 referred employees at an event site.

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<sup>3</sup> As referenced above, the duties and responsibilities of production foremen, senior foremen, and the national production manager are identical. The difference in title designation reflects the size and type of event assigned. Many events require the use of multiple production foremen.

The record reflects that the senior foremen and the national production manager are paid by a traditional salary method. The production foremen receive a "fluctuating hourly wage," which is described by Employer witness Bludworth as being permitted by the Department of Labor and "almost identical to a fixed salary." The production foremen all receive the same fringe benefits.

The duties of production foremen also include assisting the other employees in the unit determined to be appropriate in this matter in loading trucks at the Employer's warehouse and driving trucks to an event location. At the event location, a production foreman may assist the employees represented by IATSE Local 99 in such matters as skirting tables and setting up booths.

### **ANALYSIS OF APPLICABLE LEGAL AUTHORITY AND THE PARTIES' POSITIONS**

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding supervisors from the protections afforded by the Act. Section 2(11) of the Act specifically defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. **See KGW-TV**, 329 NLRB 378, (1999); **Providence Hospital**, 320 NLRB 717 (1996). The requirement of use of independent judgment, however, is conjunctive. Thus, an individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. **KGW-TV**, Id. Thus, an individual possessing Section 2(11) supervisory indicia must exercise authority in a manner that is not merely routine or clerical in nature. Only individuals with genuine management prerogatives are to be considered supervisors, as opposed to lead men and other minor supervisory employees. **Panaro & Grimes, d/b/a Azusa Ranch Market**, 321 NLRB 811 (1996). As stated by the Board recently in **Wal-Mart, Stores, Inc.**, 340 NLRB No.

31 (2003), “Because the Act excludes any ‘supervisor’ of the employer from the definition of ‘employee’ entitled to the Act’s protections, the Board has a duty not to construe supervisory status too broadly.” Finally, in the matter now under consideration the burden is on the Employer, as the party alleging supervisory status, to prove that production foreman employed by the Employer are statutory supervisors. **NLRB v. Kentucky River Community Care**, 532 U. S. 706 (2001).

The Employer asserts that production foremen are supervisors, because they use independent judgment in exercising authority in the interest of the Employer to carry out the following primary indicia of supervisory status: (1) hiring employees, (2) terminating employees, (3) disciplining employees, and (4) responsibly directing and assigning work to employees. The Employer further asserts that the production foremen exercise certain secondary indicia of supervisory status. These primary and secondary indicia are discussed below.

(1) Primary Indicia

A. Hiring employees

With respect to hiring employees, national production manager Guy Stones, one of the employees at issue herein and a witness called by the Petitioner, testified that for a particular show he determines the number of forklift operators, electricians, laborers, and other craft employees required and the time that these employees are needed. Stones specifically testified in this regard, “It’s not just, ‘Give me 10 men. It’s, I’ve got to have 10 men on this day for this number of hours,’ and estimating this many hours of overtime.” This testimony contradicts the Petitioner’s assertion that production foremen “do not control the actual hiring of show people.” While the Employer has contractually

agreed with IATSE Local 99 to allow that labor organization to refer employees from its hiring hall in fulfilling the manning requirements at various shows being serviced by the Employer (and, thus, the production foreman does not control the particular identity of individuals hired), the record establishes that the production foreman solely determines the number, type, and qualification of employees necessary to complete the Employer's obligation to a client. It is beyond dispute that this authority is carried out by the production foreman in the interest of the Employer. The Board has long held that the possession and exercise of hiring authority renders the employee a supervisor within the meaning of the Act. See e.g., **W. Horace Williams Co.**, 130 NLRB 223 (1961); **Gino Morena, d/b/a Gino Morena Enterprises**, 287 NLRB 1327 (1988).

B. Terminating employees

With respect to terminating employees, Petitioner witness Stones testified in response to a question concerning whether he had terminated employees, that over the course of a year on four or five occasions, "I have asked to have one removed from a call." Stones testified that in this circumstance, "I make the decision that they should be removed or I need to take that to my steward and ask them to make that happen."<sup>4</sup> The authority to cause the discharge of employees is a primary indicia sufficient to render the employee a statutory supervisor. **Pennsylvania Truck Lines**, 199 NLRB 641 (1972); **Fortinbras Services, Inc. d/b/a Darbar Indian Restaurant**, 288 NLRB 545 (1988).

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<sup>4</sup> Stones, who has been a production foreman for approximately nine years, testified that on every call he has worked, one of the IATSE Local 99-represented employees is designated "lead person" and, if more than sixteen employees are required, one of the employees is designated "steward." In this latter circumstance, the steward is designated a "non-working" steward. Stones further testified that he controls the jobsite and that he had had occasion to discipline stewards. Stones noted that while on the job, the steward represents the Local (Union), and that he represents the Employer.



### C. Direction and assignment of work

The record establishes that production foremen are responsible for directing and assigning work to employees at the event site. Petitioner witness Stones testified that he talks with the IATSE Local 99 steward at the event site before the work begins to brief him “on how many people I would like in what positions.” Once the work has been assigned, Stones testified that, “I’ll keep an eye on them, make sure they doing their job. The steward also does that.” Although Stones did not specify exactly what percentage of his worktime was devoted to overseeing the IATSE Local 99-represented employees, he noted, “I would say that probably 50 to 60 percent of the shows I do, I’m supervising these crews a good portion of the time.”

The record also discloses that the Employer’s production foremen directly represent the Employer in the performance of its obligation to customers. They are charged with providing whatever materials, equipment, and labor are needed for a customer to present its event from beginning to end and in meeting customer demands that may change during the course of the event. For example, Stones testified that upon receiving this sort of communication from a customer, “I would generally go to my steward and say, ‘I need to have four people sent over here to help me with this.’”

Further, Employer witness Richard Burn<sup>5</sup> testified without contradiction that production foremen are authorized to transfer employees from one venue to another and to change employee schedules. Additionally, the record reflects that production foremen, of their own volition, authorize overtime work hours for employees to complete the Employer’s obligation to its customers.

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<sup>5</sup> As noted above, the parties stipulated that Burn, who became one of two production managers for the Employer in November 2004, is a statutory supervisor. Prior to that time, Burn was a production foreman.

The Petitioner, while conceding that production foremen direct employees, asserts that this direction is effectively limited by restrictions in the collective bargaining agreement in effect between the Employer and IATSE Local 99 that spell out various terms and conditions of employment. I find the Petitioner's assertion to be unavailing. The fact that certain terms and conditions of employment are described in a collective bargaining agreement does not preclude a statutory supervisor from exercising independent judgment in the interest of his employer in directing the work of those employees. Moreover, the Petitioner cannot argue that the Union steward or the collective bargaining agreement itself is the supervisor of the employees represented by IATSE Local 99. The only possibilities are that these employees have no direct supervision (an unlikely possibility given that there may be up to 100 such employees in need of supervision on a given event) or that the production foremen are, in fact, their supervisors.

Employees who use independent judgment in directing other employees of the employer are supervisors within the meaning of the Act. **DST Industries**, 310 NLRB 957 (1993); **Venture Industries**, 327 NLRB 918 (1999). I find the record in this matter supports a finding that the production foreman at issue exercise sufficient authority to render them statutory supervisors.

(2) Secondary indicia

In addition to the primary indicia found above, the Employer also argues that the production foremen at issue possess and exercise certain secondary indicia of supervisory status. Specifically, the record further shows that production foremen attend weekly management meetings with Employer vice-president Bludworth,

stipulated supervisors, and sales employees at which time Employer policies and procedures are discussed. In addition, production foremen review employee timesheets for verification of time recorded and signify approval with their signatures.<sup>6</sup>

It is well settled that such secondary indicia are relevant considerations in a supervisory status analysis, when the primary indicia listed in Section 2(11) are present. See **Ken-Crest Services**, 335 NLRB 777 (2001). Because, primary indicia are present in the instant matter, the secondary indicia presented are further evidence to establish that the Employer's production foremen are statutory supervisors.

### **CONCLUSION**

Based on the above-cited authority, the entire record, and for the reasons detailed above, I find that the Employer has met its burden of establishing that the production foremen at issue are statutory supervisors, and I shall exclude them in the unit found appropriate for bargaining.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director among the employees in the Unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.<sup>7</sup> Eligible to vote are those in the Unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this

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<sup>6</sup> The fact that IATSE Local 99 stewards perform a similar function with the timesheets is irrelevant.

<sup>7</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
AFL-CIO, LOCAL 222**

**LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of

this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Regional Director of the Board's Region 12, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office of Region 27, National Labor Relations Board, Suite 700-North, 600-17<sup>th</sup> Street, Denver, Colorado 80203-5433 on or before **February 18, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **February 25, 2005**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 11<sup>th</sup> day of February 2005.

/s/ Wayne L. Benson

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Wayne L. Benson, Acting Regional Director  
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